88- 1806

No.

Supreme Court, U.S.
FILED
MAY 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

LAND AIR DELIVERY, INC., - - - Petitioner

versus

NATIONAL LABOR RELATIONS BOARD, - - - - - - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID LEIGHTTY
TILFORD, DOBBINS, ALEXANDER & BUCKAWAY
600 W. Main Street, Suite 202
Louisville, Kentucky 40202
(502) 584-6137
Counsel of Record

PAUL V. GUAGLIARDO
601 W. Main Street, Suite 202
Louisville, Kentucky 40202
Counsel for Petitioner

LOUIS J. AMATO
Attorney at Law
P .O. Box 340
Bowling Green, KY 42102-0340
Of Counsel

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTIONS PRESENTED

1. Whether replacement of striking employees with contractors is the equivalent of replacement of the striking employees with "scab" employees in an economic strike, and is therefore not unlawful under the National Labor Relations Act.

2. Whether the National Labor Relations Board violates an employer's Due Process right to have both notice, and an opportunity to respond, by finding the six-month limitation period of Section (10)(b) of the Act to have been tolled because of "intentional" or "fraudulent" concealment, when there is no allegation of, evidence of, or argument concerning a claim of intentional or fraudulent concealment.

> [Note: Petitioner states Question 3 not as a reason for grant of certiorari, but solely to preserve the right to argue the issue should certiorari be granted.]

3. Whether it is error to hold that a claim under Section 8(a)(5) of the Act is not barred by the applicable six-month limitation period when the Section 8(a)(5) claim was raised by an amended charge filed more than eleven months after the conduct, and the original charge raised only Section 8(a)(3) claims and was itself filed more than six months after the Section 8(a)(5) conduct was found to have occurred.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioner Land Air Delivery Inc., and the respondent National Labor Relations Board. Appearing in proceedings before the National Labor Relations Board below, although not a party therein, was Local 41, International Brotherhood Teamsters; Local 41 did not appear or take part in any way in the proceedings in the United States Court of Appeals for the District of Columbia below.

Pursuant to Rule 28.1 of the rules of this Court, petitioner states that the co-owners of the petitioner (a corporation) are also the equal and only stockholders in the following corporations: Bowling Green Beer Distributors, Inc.; Land Air Express, Inc.; TDD, Inc.; Cargo Express, Inc.; and Quality Sanitation, Inc. All of the foregoing corporations are incorporated in the state of Kentucky. The co-owners of petitioner are Joseph P. Schneller, Sr. and Marilyn L. Schneller, his wife; Joseph P. Schneller, Sr. is the sole stockholder of Interstate Express Systems, Inc., a Kansas corporation.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

LIST OF PARTIES and RULE 28.1 LIST ii

TABLE OF AUTHORITIES ..... iv- v

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 3- 4

STATEMENT OF THE CASE 4–12

Introduction 4- 5

The Petitioner's Business Practice of Using Contractors 5- 6

The Labor Dispute and Consequent Strike 6

Use of Contractor Replacements During Strike 7

Termination of the Strike—Finding of No "Unfair Labor Practice" Strike 8

The Charge in the Case at Bar 8–10

The Decision of the NLRB 10–11

The Decision of the District of Columbia Court ... 11–12

REASONS FOR GRANTING THE WRIT 12–29

I. This Matter Raises an Issue of Importance and the Decision Below Conflicts with a Decision of the Ninth Circuit 12–22

The Importance of the Issue 12–19

Conflict with Another Appellate Court 19–22

II. The Question of Notice and Opportunity to Respond to an Unpleaded and Unproved Finding of Intentional or Fraudulent Concealment Presents an Important Constitutional Issue 22–29

CONCLUSION 29

(Appendix presented separately, due to voluminous nature of decisions below.)

TABLE OF AUTHORITIES

PAGE

American Cyanamid Co. v. *NLRB*, 592 F. 2d 356 (7th Cir. 1979) 21

Belknap, Inc. v. *Hale*, 463 U.S. 491 (1983) 13

Buckley Broadcasting Corporation of California, 284 NLRB No. 113 (1987) 15

Charlotte Telecasters v. *Jefferson Pilot Corp.*, 546 F. 2d 570 (4th Cir. 1976) 26

Equitable Gas Co. v. *NLRB*, 637 F. 2d 980 (3rd Cir. 1981) 17

Fibreboard Corp. v. *NLRB*, 379 U.S. 203 (1964) ..13, 15, 22

Glus v. *Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959) 26

Hawaii Meat Company v. *NLRB*, 321 F. 2d 397 (9th Cir. 1963) 11, 19

Holmberg v. *Armbrecht*, 327 U.S. 392 (1945) 25

ILGWU v. *NLRB*, 463 F. 2d 907 (D.C. Cir. 1972) 28

Intern. Ass'n. of Bridge v. *NLRB*, 792 F. 2d 241 (D.C. Cir. 1986) 28

J.C. Penney v. *NLRB*, 384 F. 2d 479 (10th Cir. 1967). 27

Local Lodge No. 1424, IAM v. *NLRB*, 362 U.S. 411 (1960) 24

NLRB v. *Blake Construction Co., Inc.*, 663 F. 2d 272 (D.C. Cir. 1981) 27

NLRB v. *Brown*, 380 U.S. 278 (1965) 13, 16

NLRB v. *Don Burgess Construction Corporation*, 596 F. 2d 378 (9th Cir. 1979), cert. den. 444 U.S. 940 (1979) 26

NLRB v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967) .13, 14

NLRB v. *Insurance Agents' International*, 361 U.S. 477 (1960) 13, 16, 18

NLRB v. *King Radio Corporation*, 416 F. 2d 569 (10th Cir. 1969), cert. den. 397 U.S. 1007 (1970) 17

NLRB v. *Mackay Radio & T. Co.*, 304 U.S. 333 (1938) .13, 19

PAGE

NLRB v. *Quality C.A.T.V.*, 824 F. 2d 542 (7th Cir. 1987) 27

NLRB v. *Tamper, Inc.*, 522 F. 2d 781 (4th Cir. 1975). 27

Road Sprinklers Fitters Local Union No. 669 v. *NLRB*, 778 F. 2d 8 (D.C. Cir. 1985) 27–28

Soule Glass and Glazing Co. v. *NLRB*, 652 F. 2d 1055 (1st Cir. 1981) 27

TWA v. *Independent Fed. of Flight Attendants*, — U.S. —, 57 LW 4283 (1989) 13

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

LAND AIR DELIVERY, INC., ... *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, . . . *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Land Air Delivery, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, initially issued and entered on December 2, 1988, a Petition for rehearing having subsequently been denied on March 2, 1989, and the opinion having been amended by order of March 29, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia is reported at 862 F. 2d 354, and is reprinted, along with orders denying rehearing and amending, in the appendix, which is separately presently.

The decision of the National Labor Relations Board, affirming the decision of its Administrative Law Judge, is reported as 286 NLRB No. 107, and is reprinted, along with the decision of the Administrative Law Judge, in the separate appendix hereto.

JURISDICTION

This matter began with the issuance of an administrative complaint of an unfair practice under Section 10(b) of the National Labor Relations Act (29 USC § 160(b)).

Following the decision of the NLRB, and pursuant to Section 10(f) of the National Labor Relations Act (29 USC § 160(f)), the petitioner filed with the United States Court of Appeals for the District of Columbia Circuit a petition for review of the order of the NLRB, and the respondent thereafter timely filed with the same court a cross petition for enforcement of its decision, pursuant to Section 10(e) of the Act (29 USC § 160(e)). The District of Columbia Circuit issued its opinion on December 2, 1988, denying petitioner's petition for review (but inadvertently omitting to grant the respondent's cross petition for enforcement). The petitioner timely petitioned for rehearing, with a suggestion that rehearing be held en banc, and on March 2, 1989, the District of Columbia Circuit denied the petition for rehearing. By order dated March 29, 1989, and pursuant to motion of the respondent, the District of Columbia Circuit corrected its original opinion to include language granting the respondent's cross petition for enforcement.

Jurisdiction of this court to review the judgment of the District of Columbia Circuit is invoked under 28 USC 1254, as referenced in 29 USC § 160(e).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

29 USC § 158(a) (1), (3) and (5). Unfair labor practices by employer.

It shall be an unfair labor practice for an employer—

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization [;]

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of 159(a) of this title.

29 USC § 160(b). Complaint and notice of hearing.

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board or any agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof on the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. . . .

Amendment V, United States Constitution.
Due Proces. of Law (inter alia)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Introduction

The essential facts in this matter may be summarized thus:

During an economic strike the employer (petitioner herein) replaced the striking truck-driver employees with contractor drivers.

Upon the end of the strike, the petitioner declined to reinstate the employee drivers because there was no work available as the contractor drivers were and had been performing all available work.

The strike was motivated in part by a dispute over whether the collective bargaining agreement permitted the petitioner to use contract drivers (as it had done for many years); however, during the strike, and before all of the strikers had been replaced by contract drivers, the collec-

tive bargaining agreement expired, the petitioner having given due notice of intent to terminate the agreement.

The National Labor Relations Board, in an order enforced by the District of Columbia Circuit, found the petitioner guilty of (1) refusing to bargain with the union in connection with the contracting which occurred during the strike, and (2) discriminating against the employees for striking, by failing to reinstate them at the strike's end. The refusal-to-bargain charge was not filed until well after the six-month limitation period had expired, but the ALJ found that the limitation period was tolled because of "fraudulent concealment" of use of contractor drivers, even though such concealment was not alleged, was not the subject of proof, and was not argued by the General Counsel.

Following are the salient details.

The Petitioner's Business and Practice of Using Contractors.

The petitioner was a company engaged in using small trucks to pick up and deliver packages for overnight express air carriers. It was an air freight motor carrier performing the ground portion of air shipments to and from the airport located in Kansas City, Missouri. Petitioner's major customer was Emery Air Freight, and petitioner operated out of a loading dock owned by Emery and located near the airport.

Petitioner utilized truck drivers of two types: there were thirteen employee drivers; there was also a varying number of drivers who were not employees, but were contractors. Both employee drivers and contract drivers wore the same uniforms.

The employee drivers constituted a collective bargaining unit of which Teamsters Local 41 was the certified representative under the National Labor Relations Act. Local 41 was first certified as a representative of that bargaining unit in 1973.

In 1975, the NLRB issued a "unit clarification" decision acknowledging that petitioner utilized both the employee drivers who were the members of the bargaining unit, and contractor drivers who, the Board clarified, were not members of the collective bargaining unit.

The Labor Dispute and Consequent Strike.

As of the fall of 1984, there had existed for some two years a dispute between petitioner and Local 41 over whether or not the then-existing collective bargaining agreement between them prohibited petitioner from using contractor drivers. There were grievances under the contract concerning this dispute.

On November 13, 1984, the union began a economic strike against Land Air, motivated in part by the dispute over whether the petitioner could use contractor drivers under the terms of the collective bargaining agreement.

The union began the strike at 6:00 a.m. on October 13, 1984, without prior notice or warning of any kind to petitioner. Because the nature of petitioner's business involved delivery and pick-up of express packages, continuing service was essential. Petitioner's major customer, Emery, imposed strict deadlines for pick-up and delivery of its freight, which was guaranteed to occur no later than overnight. The users of the air freight service paid a premium to have their documents and packages delivered as fast as possible.

Use of Contractor Replacements During the Strike.

As the strike wore on (it lasted into spring of 1985), petitioner increasingly utilized contractor replacements, as opposed to employee replacements. By the time the striking employees made an unconditional offer to return to work and end their strike on April 9, 1985, all of the replacement drivers were contractors rather than employees. The factual finding below was that the shift over to exclusive use of contractor drivers occurred in the period February 20 to March 1, 1985.

A primary reason for the petitioner's ultimate use of contractors, as opposed to employee replacements, was the widespread vandalism and violence engaged in by the striking employees. This pattern of conduct was found to exist by the Administrative Law Judge in his decision affirmed by the NLRB, and resulted in the Board's affirmation of the discharge of five of the thirteen bargaining unit employees. The pattern of vandalism and violence caused an immediate increase in petitioner's expenses due to the need to provide both security for and repair of vehicles and property. As petitioner began to utilize contractor drivers, the need for security and cost of repair was cut, because the contractor drivers generally owned their own vehicles and took their trucks home with them at night. This saved the petitioner the cost of providing security and relieved the petitioner of the responsibility for repairing damage to the vehicles. Furthermore it was more difficult to carry out vandalism against the vehicles when they were dispersed.

Termination of the Strike — Finding of No "Unfair Labor Practice" Strike.

On March 31, 1985, the collective bargaining agreement, under which Local 41 had claimed petitioner was prohibited from use of contractor drivers, expired by its own terms, petitioner having provided due notice of intent to terminate.

On April 9, 1985, the striking employees made an unconditional offer to return to work, confirmed two days later by letter. Petitioner informed the employees that there was no work available for them.

Within a few weeks, the union filed its first unfair labor practices charges (not the charges in question here), which were dismissed by the Board on May 21, 1985. These charges alleged that petitioner discriminated against the striking employees for exercise of protected rights in failing to rehire them upon their unconditional offer to return to work.

In the letter dismissing those first charges, the Regional Director specifically found that there was no unfair labor practice strike, and specifically stated that, because the striking employees were entitled to return to work only at such time as positions were available, "the employer's refusal to immediately reinstate its striking employees is not a violation of the Act."

The Charge in the Case at Bar.

Following the May 21 dismissal of those first charges, there was an exchange of correspondence between Local 41 and petitioner concerning information about the replacement drivers and the status of the bargaining unit drivers,

and about dates to begin negotiation of a new contract. However, the union did not pursue negotiation of a new collective bargaining agreement. Instead, on October 8, 1985, the union filed a new unfair labor practice charge, the charge which is the subject of this petition. The charge alleged that petitioner allowed contractors to perform bargaining unit work following the unconditional offer to return to work and that petitioner thereby violated Section 8(a)(3) of the Act (discrimination).[1]

The charge made no reference of any kind to Section 8(a)(5) (refusal to bargain), nor did it in any way mention bargaining or refusal to engage therein. Furthermore, the charge on its face limited itself to events occurring on or after April 9, 1985—the date of the unconditional offer to return to work, which happened to be precisely six months prior to the filing date of the charge.

The charge was amended on February 20, 1986, mentioning Section 8(a)(5) and raising a claim of refusal to bargain, both for the first time in any document in the case. The amendment expressly referred to actions which occurred not only one year prior to the date of the amended charge, but also more than six months prior to the date of the original charge, for the Section 8(a)(5) conduct was alleged to have occurred "On or about February 1, 1985 . . ." (The ALJ, as affirmed by the Board and the D.C. Circuit,

---

[1]This charge, as is the case with all charges filed with the NLRB, also referenced Section 8(a)(1) of the Act; however, this reference is an allegation of a "derivative" Section 8(a)(1) existing only by virtue of the claimed violation of another subsection of Section 8(a). See 1938 NLRN Ann. Rep. 52 (1939). The same is true for subsequent references to Section 8(a)(1) as this case progressed. Consequently, in this Petition we will omit further reference to Section 8(a)(1).

found it occurred between February 20 and March 1, 1985—still beyond the six-month period.)

The administrative complaint issued pursuant to those unfair labor practice charges alleged unlawful refusal to reinstate strikers, and subcontracting bargaining unit work without notice to or bargaining with the union. The complaint contained no allegations, and gave no notice of a claim of, intentional or fraudulent concealment. All claims of refusal to bargain were expressly alleged to have occurred in February, 1985.

The Decision of the NLRB

The Administrative Law Judge, in a 60 page, single-spaced decision issued on September 30, 1986, found that the petitioner had unlawfully failed to bargain with the union when it decided to use contractor drivers during the strike, and that the petitioner wrongfully coerced and discriminated against the striking employees in failing to return them to work following their unconditional offer to return to work.

The National Labor Relations Board, by decision of November 27, 1987, concluded, without explanation that use of contractor drivers "is not equivalent" to use of permanent employee replacements. The Board additionally found that the time limits imposed by Section 10(b) of the National Labor Relations Act (29 USC § 160(b)) did not bar claims for conduct prior to April 9, 1985. In concluding that petitioner had violated Section 8(a)(5) and that the Section 10(b) limitations were tolled, the ALJ as affirmed by the Board relied in part on his finding that petitioner had "fraudulently concealed" the subcontracting from the union. That finding was made by the ALJ despite the fact

that neither "fraudulent concealment" nor any facts to support such a claim were ever charged by the union or alleged by the General Counsel; nor were facts introduced at the hearing to support such a claim; nor did the General Counsel brief the issue to the ALJ. At no time prior to the ALJ's opinion was petitioner on notice that fraudulent concealment was an issue in this matter either to support the substantive violations or to support avoidance of the Section 10(b) limitations.

The Decision of the District of Columbia Court.

At all stages in this proceeding, petitioner relied extensively upon the decision of the Ninth Circuit in *Hawaii Meat Company* v. *NLRB*, 321 F. 2d 397 (9th Cir. 1963), where the court, denying enforcement of an NLRB decision similar to the decision here, held that permanent replacement of striking employee truck drivers with contractor drivers was not a violation of the Act if done for economic reasons.

The District of Columbia Circuit here interpreted *Hawaii Meat* "to stand for no more than the proposition that an employer may not be obliged to bargain with a union about permanent subcontracting during a strike when that subcontracting is necessary to the business purpose of keeping the plant continuously in operation and time of decision is of the essence." And, although acknowledging the right of an employer to permanently replace strikers with new *employees* during a strike, the D. C. Circuit held that replacing strikers with permanent subcontractors is not the equivalent: "We see at least a theoretical distinction, however, and that difference probably has practical consequences." The Circuit Court opined that use of contractors tends to destroy bargaining unit, whereas use of

employee replacements does not. The court declined to address petitioner's argument that the bargaining unit was not destroyed because the striking employees retained their right to reinstatement in the event work became available as, for instance, would occur when some or all contractors ceased working, or in the event of a new collective bargaining agreement under which the employer agreed to rehire the striking employees. The D.C. Circuit concluded there was no need in this case "to consider what circumstances would justify an employer's unilateral decision permanently to subcontract bargaining unit work to withstand a strike," because, the court stated, the case at bar did not even arguably contain circumstances justifying such action.

REASONS FOR GRANTING THIS WRIT

I. First Issue

This Matter Raises an Issue of Importance and the Decision Below Conflicts with a Decision of the Ninth Circuit.

THE IMPORTANCE OF THE ISSUE.

This case provides an opportunity for far-reaching clarification on a long-standing issue: the tension between an employer's right to use an economic weapon of the labor arena—specifically, "permanent replacement"[2] of striking

[2]The phrase "permanent replacement" is employed here as a term of art in the field of federal labor law. It refers to replacement of striking employees in such a way that the employer retains the replacements without intent to immediately reinstate the strikers at the end of the strike. However, as discussed herein, the replaced employees continue to hold the status of employees and continue to hold the right to reinstatement should vacancies materialize, or should the union secure an agreement providing for their reinstatement. Hence, the word "permanent" may appear somewhat misleading if used in the ordinary sense.

employees—and the employer's obligation to bargain over contracting of bargaining unit work. The question whether, and under what circumstances, an employer may utilize permanent replacement of strikers by contractors as a response to an economic strike, would be one of first impression in this Court. A decision here would resolve the apparent disparity between *NLRB* v. *Mackay Radio & T. Co.*, 304 U. S. 333 (1938), and its progeny,[3] on the one hand, and *Fibreboard Corp.* v. *NLRB*, 379 U. S. 203 (1964), on the other. The guidance would be of enormous use both to the National Labor Relations Board, which administers the applicable statutes,[4] and to the employers and labor organizations subject to those statutes.

It has long been established by decisions of this Court, that an employer may "permanently" replace striking employees, and is not obligated to discharge the replacements upon termination of the strike to create places into which to reinstate the strikers. *NLRB* v. *Mackay Radio & T. Co.*, 304 U. S. 333 (1938). However, this Court has never

---

[3]In recent years, *Mackay's* progeny includes: *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983), where this Court held there was nothing inconsistent with federal labor law in an employer entering into individual employment contracts giving permanent job rights to strike replacements; and *TWA* v. *Independent Fed. of Flight Attendants*, ___ U.S. ___, 57 LW 4283 (1989), where the Court held that the *Mackay* doctrine applies to bargaining unit employees who "cross over" during a strike, and that an employer need not "bump" the crossovers to reinstate more senior strikers, at the strike's end. Prior decisions in the *Mackay* line include: *NLRB* v. *Insurance Agents' International*, 361 U.S. 477 (1960); *NLRB* v. *Brown*, 380 U.S. 278 (1965); and *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967).

[4]The statutes are known as the National Labor Relations Act (NLRA) as amended, or as the Wagner and Taft-Hartley Acts. The pertinent sections are codified at 29 U.S.C. §§ 152-160.

addressed whether, or under what circumstances, such permanent replacements may be contractors, as opposed to employee replacements. Both sides of labor disputes would find the answer to that question highly significant, although it is clear that each side would pursue a different answer before this Court.

The question we request this Court to address is: What must happen to strikers whom an employer has replaced with contractors retained during the strike to perform the work of the strikers, when the strike is over? Section 2(3) of the NLRA has for more than fifty years provided that employees engaged in a strike retain the status of employees (and hence, the status of members of any existing bargaining unit). And the decision in *Mackay* has established for nearly as long that the strikers remain employees even though "permanently" replaced and not reinstated at the end of the strike. See also *NLRB* v. *Fleetwood Trailer Co.*, 389 U. S. 375 (1967). The decisions below indicate that permanent replacement by contractors "destroys the bargaining unit." But this appears to ignore the unequivocal statements of this Court that replaced strikers remain employees (even though not reinstated after the end of the strike) and the inevitable conclusion that, if there continue to be employees, there can continue to be a bargaining unit. It would be incumbent upon the collective bargaining representative to attempt to secure an agreement which would put the employees back to work. But this hardly means there is no bargaining unit, and is precisely the same situation the union would be in had the replacements been "scab" employees instead of contractors.

The proposition that permanent replacement with contractors is more destructive of a bargaining unit than

permanent replacement with employees is flawed. Even the NLRB has recently recognized that replacement employees cannot be presumed to have pro-union sentiments and that an employer may take this into consideration in deciding whether a bargaining obligation has ceased to exist due to the union's loss of majority support from the employees. *Buckley Broadcasting Corporation of California*, 284 NLRB No. 113 (1987) (where the Board reversed its prior policy of presuming union support among strike-replacement employees and noted that that presumption had been rejected by every circuit court which reviewed it). Accordingly, the destructive effect on the bargaining relationship of using contractor replacements cannot be presumed to be greater, or less, than that of using employee replacements.

The issue posed here concerns the economic weapons available to an employer to respond to a strike. The decisions below erroneously focus on bargaining issues, specifically whether the employer must during the strike give notice before "permanently" subcontracting bargaining unit work. Those decisions rely on *Fibreboard Corp.* v. *NLRB*, 379 U. S. 203 (1964), where this Court held that subcontracting is generally a mandatory subject of bargaining. But this focus misses the real issue, which is simply whether permanent replacement with contractors was, at least under the facts of this case, the equivalent of replacement with permanent employees. On this point, the existence of a strike is crucial and, we submit, distinguishes *Fibreboard*, for replacement of employees with new hires would certainly be a mandatory bargaining topic in a *non*-strike situation. The Board would quite properly hold an employer which, unilaterally and without notice, replaced its union employees with new hires guilty of failing to

bargain, even if the employer's motives were wholly nondiscriminatory. But *Mackay* and its progeny make it certain that the same employer may make precisely the same unilateral replacements if a strike is in progress.

The law is clear that an employer need not bargain about the economic weapons used in response to a strike. *NLRB* v. *Insurance Agents' International*, 361 U. S. 477, 490 (1960):

> Our labor policy is not presently erected on a foundation of government control of the results of negotiations. [Citation omitted.] Nor does it contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union.

See also, *NLRB* v. *Brown*, 380 U. S. 278 (1965).

As the District of Columbia Circuit stated below, it has been undisputed that an employer may utilize contractor replacements during a strike, provided they are "temporary" replacements—i.e., subject to termination upon the offer of the striking employees to return to work. And no one has suggested that such "temporary" contracting during a strike would first require notice and bargaining. That, presumably, is why the union here first filed only a Section 8(a)(3) charge, and only belatedly (with obvious prompting from the General Counsel) amended the charge to reference Section 8(a)(5) and bargaining.

The issue is what happens to the strikers, and the replacements, immediately upon the end of the strike, not whether there was bargaining *during* the strike over use of the contractor drivers. This is not a bargaining case but a case concerning the nature and extent of the permissible response to a strike.

The D.C. Circuit held that *Mackay* did not "trump" *Fibreboard;* but it must be recognized that *Fibreboard* was a duty to bargain case in a non-strike setting. In the *Mackay* line of cases, on the other hand, this Court has held and reaffirmed that the long-recognized duty to bargain is not a bar to the utilization by unions and employers of the economic weapons at their disposal during, or in response to, a strike or similar dispute. *Insurance Agents, supra.*

The Court in *Fibreboard* was careful to state that its holding was limited to situations involving appropriate facts. The Court stated ". . . on the facts of this case, the 'contracting out' of the work" is a mandatory bargaining subject, 379 U.S. at 204, and held:

> Our decision need not and does not encompass other forms of "contracting out" or "subcontracting" which arise daily in our complex economy.

Id. at 215. Circuit courts have held contracting out to be exempt from mandatory bargaining under *Fibreboard*, in appropriate cases. See, e.g., *Equitable Gas Co.* v. *NLRB*, 637 F. 2d 980 (3rd Cir. 1981); *NLRB* v. *King Radio Corporation*, 416 F. 2d 569 (10th Cir. 1969), cert. den. 397 U.S. 1007 (1979).

The motive (or "business necessity") of the employer in replacing the striking employee drivers with "permanent" contractor drivers is equally immaterial here. As stated in *Mackay*, all the employer need demonstrate is that the replacements were retained "in an effort to carry on the business." 304 U.S. at 345. This is not the same as showing "business necessity" as is required in the non-strike *(Fibreboard)* case. Nothing in *Mackay* or its progeny indicates that the employer must show that use of *"permanent"* replacements was necessary in order to "carry on the business," or even preferable to do so. Even the

District of Columbia Circuit, in its opinion below, stated in note 6:

> As far as we can tell [the Board] has never held that an employer must meet the burden of demonstrating that defensive measures taken were its only option or that they were the option that would have the least adverse effect on the bargaining unit.

Again, the issue returns to what happened to the strikers and the replacements at the end of the strike, and whether what happened was lawful. If the permanent replacement of employee drivers with contractor drivers was the equivalent of permanent replacement of strikers with "scab" employees under *Mackay*, then it is clear that neither the employer nor the Board would have to demonstrate what were the employer's motives in such action.

The dispute between the employer and the union here concerned interpretation of a collective bargaining agreement and a long established employer practice of using contractor drivers. It was a lawful dispute, under the Act, and both parties were entitled to make use of the economic weapons of the labor arena. The union was striking, in part, to advance its position that the collective bargaining agreement prohibited use of contractor drivers. The employer was using contractor drivers to continue to operate.

We are respectfully requesting this Court to address whether that activity was within the rules of economic contention permitted by the NLRA. As the Court stated in *NLRB v. Insurance Agents' International*, 361 U.S. 477 (1960):

> The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and

> parcel of the system that the Wagner and Taft-Hartley Acts have recognized.

361 U.S. at 489.

We submit that it is a matter of considerable importance whether and to what extent those economic weapons include an employer's replacement of striking employees with contractors, as they clearly include replacement of same with "scab" employees.

CONFLICT WITH ANOTHER APPELLATE COURT.

The District of Columbia Circuit, in the decision below, held that permanent replacement of striking employees with contractors is not the equivalent of permanent replacement of strikers with employees. This decision is in direct conflict with the decision of the Ninth Circuit in *Hawaii Meat Company* v. *NLRB*, 321 F. 2d 397 (9th Cir. 1963), a case heavily relied upon by petitioner in the various proceedings below. In that case, the Ninth Circuit held that an employer may lawfully contract out bargaining unit work, without bargaining, as a response to a strike, and was express in equating such action to use of permanent employee replacements:

> We think it no more proper for the Board to intrude upon the decision of the employer, in a strike situation, to keep going by subcontracting, than to intrude upon a decision to replace, permanently, individual strikers.

321 F. 2d at 400. In coming to that conclusion, the Ninth Circuit expressly relied upon this Court's decision in *NLRB* v. *Mackay Radio & T. Co.*, 304 U.S. 333 (1938), noting that *Mackay* indicates "[a]n employer is under no duty to offer to bargain after a strike starts, about a decision to hire replacements for strikers, even on a permanent basis." *Id.*

The facts in *Hawaii Meat* were strikingly similar to the facts in the case at bar. The company, a meat producer, used trucks for local delivery of its products. As in the instant case, time was essential, for failure to make timely delivery would result in spoilage. The company employed a small group of drivers to operate its trucks. (The bargaining unit encompassed both the truck drivers and a much larger group of production workers.) When a plant-wide strike appeared imminent, the company made contingency arrangements to permanently contract out the delivery aspect of its operation. Upon the advent of the strike, the company effected that contingency, and informed the striking employees that "[t]here are no longer any delivery truck driver or drivers helper jobs." *Id.* at 398. The Regional Director issued a complaint alleging violations of both Section 8(a)(3) (discriminatory discharge of employees) and Section 8(a)(5) (refusal to bargain) on the employer's part —precisely as was the case here—and the Board found a violation of Section 8(a)(5) (although it found it necessary to rule on the Section 8(a)(3) allegations). The Board ordered, inter alia, that the drivers be reinstated with back pay.

But the Ninth Circuit denied enforcement of the Board's decision, holding that the decision to contract was tantamount to a *Mackay* decision to replace.

In the decision below, the District of Columbia Circuit purported to honor the *Hawaii Meat* decision, but gave it a limited interpretation:

> We read *Hawaii Meat*, then to stand for no more than the proposition that an employer may not be obliged to bargain with a union about permanent subcontracting during a strike when that subcontracting is necessary to the business purpose of keeping the plant contin-

> nously in operation and time of decision is of the essence.

Slip Opinion p. 9. The D.C. Circuit read *Hawaii Meat* as "carefully drawn to deal with the exigencies of the particular situation presented, and to exclude from the decision's compass cases like the instant one." *Id.* The D.C. Circuit, thus, imposed on the employer the requirement, applicable in non-strike cases, to show "business necessity" — the *Fibreboard* standard — rather than the *Mackay* standard that the replacement of strikers be an effort to carry on the business during a strike.

We have reviewed *Hawaii Meat* many times and can find nothing in its language limiting the decision in the manner articulated by the D.C. Circuit. The Ninth Circuit was express in equating contracting of bargaining unit work during a strike with the *Mackay* doctrine, and in holding it improper for the Board to "intrude" upon such a decision.

Hence, there is a direct conflict between the doctrine adopted in this decision—which has been officially reported —and the Ninth Circuit's doctrine established in *Hawaii Meat.* (It is interesting to note that this Court in *Mackay* addressed a decision of the Ninth Circuit and, although reversing on an unrelated issue, upheld the Ninth Circuit on the issue, of the propriety of permanent strike replacements. The Ninth Circuit has been consistent in its view of this situation.)

Also erroneously purporting to reconcile itself with *Hawaii Meat* is the decision of the Seventh Circuit in *American Cyanamid Co.* v. *NLRB*, 592 F. 2d 356 (7th Cir. 1979). The Seventh Circuit gave a limited interpretation to *Hawaii Meat*, similar to the reading given by the D.C.

Circuit here (although, unlike the D.C. Circuit, the Seventh Circuit opined that *Hawaii Meat* was decided without reference to *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964); the D.C. Circuit was forceful in rejecting the notion that *Hawaii Meat* was in any way inconsistent with *Fibreboard*. See *Slip Opinion* pp. 9-10, n.5.)

The problem with any attempt to analogize or distinguish between *American Cyanamid* and either *Hawaii Meat* or the instant case is that the strike in *American Cyanamid* was an unfair labor practice strike, and consequently, the striking employees had an automatic right to reinstatement, regardless of the propriety of their replacement. In *Hawaii Meat* the Court rejected claims of an unfair labor practice strike, and in the case at bar no unfair labor practice strike was even claimed to have occurred.

The conflict between circuits is most clearly seen by comparing *Hawaii Meat* and the decision of the D.C. Circuit here. It is irreconcilable, despite language in the D.C. Circuit's opinion to the contrary, and should be resolved by decision of this Court.

II. SECOND ISSUE

The Question of Notice and Opportunity to Respond to an Unpleaded and Unproved Finding of Intentional or Fraudulent Concealment Presents an Important Constitutional Issue.

We have argued under Question 1 that Section 8(a)(5) was not violated by the petitioner's contracting out unit work during an economic strike. However, if it should be determined that the petitioner's decision to contract in February, 1985 violates Section 8(a)(5), then Question 2 presents itself because claims under Section 8(a)(5) were

not raised until well after the expiration of the six months limitation period of Section 10(b).

No charge was ever filed alleging that petitioner violated Section 8(a)(5) after April 9, 1985, when the strikers offered to return to work. Nor did the General Counsel allege any facts in his complaint to support a Section 8(a)(5) violation after April 9, 1985. The ALJ specifically concluded and found that the Section 8(a)(5) failure to bargain occurred between February 20, 1985 and March 1, 1985. The Board adopted those findings and the D.C. Circuit agreed.

The petitioner has consistently asserted, and there is no allegation or proof to the contrary, that since April 9, 1985, it has been willing to bargain with the union over what is to be done with or for the striking employees. The union never pursued bargaining on that issue.

Clearly, the union considered what happened to the striking employees after the strike to be the essential issue as is evident from the language contained in the original Section 8(a)(3) charge filed on October 8, 1985. Just as clearly, the union and the General Counsel later perceived (as the D.C. Circuit acknowledged, *Slip Opinion*, p. 12 n.8) that no Section 8(a)(3) violation for events after April 9, 1985 could be sustained unless the Board could find an 8(a)(5) violation prior to April 9, 1985. The decision on what to do with or for the striking employees *after* the strike was directly dependent on whether the petitioner's decision to contract out work *during* the strike was lawful.

Accordingly, the union, with obvious prompting by the General Counsel, on February 20, 1986, "amended" its October 8, 1985 charge by alleging a new violation under Section 8(a)(5) (failure to bargain) occurring prior to the return of the strikers. (The union also restated its original

Section 8(a)(3) charges for acts occurring after April 9, 1985). The General Counsel's complaint, filed on February 24, 1986, essentially parrots the language contained in the February 20, 1986 charge, i.e., that the petitioner violated Section 8(a)(5) by its subcontracting without bargaining in February, 1985; and violated Section 8(a)(3) by failing to reinstate the striking employees after April 9, 1985.

On its face, the General Counsel's complaint raised untimely matters. The petitioner, in its answer, affirmatively defended, inter alia, that the union's charges were barred by the six-month statute of limitations in Section 10(b) of the Act.

The Board and the D.C. Circuit concluded that the union's Section 8(a)(5) allegation concerning employer conduct in February, 1985 "related back" to the union's Section 8(a)(3) charge filed on October 8, 1985.

However, the ALJ specifically refrained from addressing the "relation back" issue. Instead, in finding that the February, 1986, Section 8(a)(5) charges were not barred by Section 10(b), the ALJ relied heavily on his finding that the petitioner had secretively and fraudulently concealed the subcontracting from the union. The ALJ concluded that the otherwise valid distinctions in *Local Lodge No. 1424, IAM* v. *NLRB*, 362 U.S. 411, 417 (1960), "have no application to a fraudulent concealment of an event urged to toll the statute."

But the General Counsel never urged the tolling of the statute by any facts supporting inferences of, or specific allegations of, fraudulent concealment.

The ALJ's finding and conclusion that the petitioner engaged in fraudulent concealment was never alleged by the union, never pleaded by the General Counsel in its

complaint, nor argued in the General Counsel's brief to the ALJ. No evidence, questioning, or cross-examining on the subject of fraudulent concealment ever took place. The General Counsel's complaint was never amended to assert fraudulent concealment.

In sum, the petitioner was never put on notice that any party was alleging that the petitioner had fraudulently concealed its subcontracting during the strike by the union.

As the Board conceded in its brief to the D.C. Circuit, the union did not file a charge nor did the General Counsel file a complaint alleging refusal to supply relevant information necessary for the union's performance of its representative function. Nor did the Board make any unfair labor practice finding in that regard.

Yet, the Board considered that "fact" to be significant when it entitled a subsection on page seven of its Statement of Case in its brief to the Court of Appeals: "D. The Company Conceals from the Union the Fact that All Bargaining Unit Work Had Been Contracted to Independent Contractors."

Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . ." 29 U.S.C. § 160(b).

Unquestionably, this Court has long held that as a matter of equitable doctrine, fraudulent concealment is read into every federal statute of limitation and will bar the application of the statute. *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1945). This Court has also long acknowledged that the person seeking avoidance of the statute because of fraud must prove it:

> "Despite the delay in filing his suit, petitioner is entitled to have his cause tried on the merits *if he can*

> *prove* that respondents' responsible agents, agents with some authority in the particular matter, *conducted themselves in such a way that petitioner was justifiably misled* into a good-faith belief that he could begin his action at any time within seven years after it had accrued." (Emphasis added.)

Glus v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, 235 (1959).

Lower federal courts are in accord that, while lack of actual or constructive notice as well as fraudulent concealment bar the application of a statute of limitations, the party seeking the benefit of the avoidance carries the burden of proof to establish the elements. *NLRB* v. *Don Burgess Construction Corporation*, 596 F. 2d 378, 383, n.2, (9th Cir. 1979), *cert. den.* 444 U.S. 940 (1979). Moreover, all presumptions are against him since his claim to exemption is against all the current of the law. *Id.* See also *Charlotte Telecasters* v. *Jefferson Pilot Corp.*, 546 F. 2d 570, 574 (4th Cir. 1976). Yet, in this case, the ALJ not only confused the allocation of the burden of proof, but also injected a new theory—fraudulent concealment.

The General Counsel did not allege lack of actual or constructive notice in its complaint. Nor did the General Counsel allege fraudulent concealment by petitioner of any facts or information upon which the union relied to its detriment, nor any facts supporting a fair inference of fraudulent concealment. Yet the ALJ's conclusion that Section 10(b) was tolled ultimately turned on a factual finding which had never been alleged prior to or litigated at the hearing, i.e. that the Company *fraudulently concealed* the subcontracting.

The due process implications are obvious. "Due process forbids the ALJ from gratuitously injecting new issues into the case and deciding them *sua sponte*." *Soule Glass and Glazing Co.* v. *NLRB*, 652 F. 2d 1055, 1079 (1st Cir. 1981). "Failure to clearly define the issues and advise an employer charged with a violation of the law of the specific complaint he must meet and provide a full hearing upon the issue presented is, of course, to deny procedural due process of law." *J.C. Penney* v. *NLRB*, 384 F. 2d 479, 483 (10th Cir. 1967).

The Federal Courts of Appeals have recognized the importance of notice and an oportunity to litigate in NLRB proceedings, both as to employers and union: *NLRB* v. *Tamper, Inc.*, 522 F. 2d 781, 789 (4th Cir. 1975) ("We believe it is an intolerable miscarriage of justice to attribute improper motives to the company officials without affording them an opportunity to defend themselves. This form of trial without notice should not be condoned."); *NLRB* v. *Quality C.A.T.V., Inc.*, 824 F. 2d 542, 546 (7th Cir. 1987) ("The test of due process in this setting is a determination of fair notice and whether fair notice is given by way of pleading, or by way of the course of proceeding of a full litigation, the crucial focus is at all times on whether notice was given which provided the party with an adequate opportunity to prepare and present its evidence."); *NLRB* v. *Blake Construction Co., Inc.*, 663 F. 2d 272, 279 (D.C. Cir. 1981) ("Even where the record contains evidence supporting a remedial order, the court will not grant enforcement in the absence of either a supporting allegation in the complaint or a meaningful opportunity to litigate the underlying issue in the hearing itself."); *Road Sprinklers*

Fitters Local Union No. 669 v. *NLRB*, 778 F. 2d 8, 16 (D.C. Cir. 1985) ("But responsibility for Grinnell's failure to hire was not charged, and neither the complaint nor the course of the hearing before the ALJ put Local 669 on notice that would be at issue. We do not know, then, what the evidence would have shown had the union been afforded an opportunity to contest the point."); *Intern. Ass'n. of Bridge* v. *NLRB*, 792 F. 2d 241, 245 (D.C. Cir. 1986); ("Since the Board does not contend that the 'indirect coercion' violation was actually litigated at any point during the course of the abbreviated proceeding before the Board, the findings of that violation cannot be reconciled with the requirements of *Blake Construction*.")

The ALJ's finding of fraudulent concealment, adopted by the Board, was obviously a critical factor in the conclusion that Section 10(b) was tolled to make the February 20, 1986, Section 8(a)(5) charge timely. The significance of that finding is underscored by the Circuit Court's opinion in which the Court cited to *ILGWU* v. *NLRB*, 463 F. 2d 907, 922 (D.C. Cir. 1972). The *ILGWU* case, as the cited quotation indicates, held that Section 10(b) was tolled because of the employer's fraudulent concealment. *Slip Opinion*, at 13.

Clearly, if the General Counsel wished to avoid the six-month limitation because of fraudulent concealment of material facts from the union, he had the obligation of pleading, proving and arguing same. He did not. That equitable doctrine was not even mentioned until the ALJ rendered his opinion. From that point on, the employer took exception to the finding, to no avail.

Petitioner is requesting this Court to grant certiorari to determine whether petitioner's due process rights under the Fifth Amendment to the United States Constitution

were violated when it had no notice or opportunity to rebut the ALJ findings relied upon to deprive petitioner of the applicable Section 10(b) limitations.

CONCLUSION

We respectfully submit that this petition for certiorari should be granted to address these issues of importance and to resolve the conflict with another appellate court. (Question 3, as stated at outset, is not offered as a basis for grant of certiorari, but to preserve the issue. This is necessary, in part, to demonstrate the determinative effect of Question 2.)

Respectfully submitted,

David Leighty
Tilford, Dobbins, Alexander & Buckaway
600 W. Main Street, Suite 202
Louisville, Kentucky 40202
(502) 584-6137

Paul V. Guagliardo
Attorney at Law
601 W. Main Street, Suite 202
Louisville, Kentucky 40202

Counsel for Petitioner

Louis J. Amato
Attorney at Law
P. O. Box 340
Bowling Green, KY 42102-0340

Of Counsel